

C. F. Eckert, Inc. and International Brotherhood of Painters and Allied Trades, Local 201. Cases 3-CA-15095 and 3-CA-15512

February 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On July 10, 1990, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, conclusions as modified, to modify the remedy, and to adopt the recommended Order as modified.

1. The General Counsel and the Charging Party except to the judge's failure to find all the violations alleged in the complaint. The complaint alleges in substance that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make timely contractually required fringe benefit fund payments and reports. The judge declined to include within the scope of his unfair labor practice findings all months covered by the complaint apparently because the Respondent made lump sum payments just before the commencement of the unfair labor practice hearing. The judge also failed to find that the Respondent violated the Act by failing to submit reports, as required by the contract, to the funds. We find merit in the exceptions.

The record indicates that the lump sum payments were untimely and the reports were not submitted or were submitted late. A failure-to-make-payments allegation encompasses all contributions that are untimely.¹ The failure to submit the accompanying reports as required by the collective-bargaining agreement was not contested. We shall amend the Conclusions of Law and recommended Order accordingly.

2. The Charging Party excepts to the judge's failure to address and grant the Charging Party's request for litigation costs. We find merit in the exception. We find the Respondent's defenses to be frivolous,² on the basis of the following factors: (1) the Respondent's violation of a prior non-Board settlement agreement concerning matters at issue here; and (2) the Respondent's failure to present any defense, other than a bare

denial of the complaint allegations.³ We shall include litigation costs in the recommended Order.⁴

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 5.

"5. The Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing to make timely payments to the pension fund and the joint apprenticeship training fund since February 1989 and by failing to submit timely reports to the funds since February 1989, as required by the collective-bargaining agreement."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, C. F. Eckert, Inc., Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to bargain collectively and in good faith with the International Brotherhood of Painters and Allied Trades, Local 201, by failing to make timely payments to the Union's pension fund and joint apprenticeship training fund and by failing to submit timely reports to the funds, as required by the collective-bargaining agreement with the Union."

2. Substitute the following for paragraph 2(a).

"(a) Submit all reports due and pay all delinquent contributions to the pension fund and the joint apprenticeship training fund as provided in its collective-bargaining agreement, plus any additional amounts as specified in this decision, and pay to the Union the litigation costs incurred in collecting the delinquent fund contributions, plus interest as specified in this decision."

3. Substitute the attached notice for that of the administrative law judge.

³ We also note the existence of provisions in the applicable collective-bargaining agreement requiring that delinquent employers pay the "reasonable costs of collecting [their] delinquent [fund contributions], including attorneys' fees."

Member Cracraft, in agreeing with ordering the Respondent to pay the Union's litigation costs, relies only on the fact that at the hearing, the Respondent's attorney made no statement of defense, did not cross-examine the General Counsel's witnesses, and put on no defense witnesses.

⁴ We shall also modify the judge's remedy to provide that any additional amounts owed on the outstanding benefit fund payments, as well as on the untimely payments made to the benefit funds, shall be calculated in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). We also modify the judge's remedy to provide that any amounts due employees and the Union shall be with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹ See *St. Agnes Medical Center*, 287 NLRB 242, 256-257 (1987).

² See *Heck's, Inc.*, 215 NLRB 765 (1974).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively and in good faith with the International Brotherhood of Painters and Allied Trades, Local 201, by failing to make timely payments to the Union's pension fund and the joint apprenticeship training fund and by failing to submit timely reports to the funds as required by our collective-bargaining agreement with the Union which covers all our journeymen, painters, tapers, paperhangers, apprentices and/or any person who uses tools of the trade other than a principal owner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our employees covered by the union contract by submitting reports and paying all delinquent contributions to the pension fund and the joint apprenticeship training fund as provided in the collective-bargaining agreement, and by paying to the Union the litigation costs incurred in collecting the delinquent fund contributions.

WE WILL make whole our employees covered by the union contract by reimbursing our covered employees for any loss of benefits they may have suffered because of our failure to make the pension and joint apprenticeship training fund contributions required by our collective-bargaining agreement, with interest.

C. F. ECKERT, INC.

Alfred M. Norek, Esq., for the General Counsel.

Prescott Sook, Esq., for the Respondent.

William Pozefsky, Esq. (Pozefsky, Bramley & Murphy), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on June 7, 1990,¹ in Albany, New York. The complaint and notice of hearing in Case 3-CA-15095 issued on August 21, 1989,² and was based on an unfair

¹ The hearing in Case 3-CA-15095 originally opened on October 19, 1989. At that time, the parties agreed on an informal settlement of the charges, wherein Respondent agreed to pay the amount owed over a period of time. When Respondent failed to do so, counsels for Charging Party and General Counsel moved to reopen the record in this matter. By order reopening record and rescheduling hearing dated May 14, 1990, I granted said requests.

² Unless indicated otherwise, all dates referred to herein relate to the year 1989.

labor practice charge filed on July 21 by International Brotherhood of Painters and Allied Trades, Local 201 (the Union). The complaint and notice of hearing in Case 3-CA-15512 issued on June 1, 1990, and was based on an unfair labor practice charge filed on March 15 by the Union. Pursuant to a motion to consolidate cases filed by Counsel, on June 4, 1990, issued an order consolidating cases, which consolidated these two matters. The consolidated complaint alleges that the Union and C. F. Eckert, Inc. (Respondent), are parties to a collective-bargaining agreement effective to April 30, 1991 (the agreement), and that the Union is the exclusive collective-bargaining representative of the following of Respondent's employees, which constitute an appropriate bargaining unit: "All journeymen, painters, tapers, paperhangers, apprentices, and/or any person who uses the tools of the trade other than a principal owner." This much Respondent admits. The consolidated complaint also alleges that since about February 1, and to date, Respondent has failed and refused to make payments to the Union's Pension Fund and Apprenticeship Program, as it is required to do under the agreement, in violation of Section 8(a)(1) and (5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation with its principal office in Albany, New York, where it is engaged as a painting contractor. During the 12-month period preceding the issuance of the complaint, Respondent derived gross revenues in excess of \$50,000 of which an amount in excess of \$50,000 was derived from providing services to other enterprises directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

As stated, *supra*, the Union is the collective-bargaining representative for Respondent's journeymen, painters, tapers, paperhangers, and apprentices. The Union has had a collective-bargaining relationship with Respondent for in excess of 20 years. The most recent collective-bargaining agreement between Respondent and the Union covering these employees is effective from May 1, 1988, through April 30, 1991.³ Among other things, the agreement provides for specified contributions by Respondent to the Union's Pension Fund and its Joint Apprenticeship Training Fund (JATF). Under the terms of the agreement, Respondent is obligated to pay to the Union an amount equal to \$2.58 for each hour worked by the Union's members, \$2.38 for pension and \$.20 for the JATF. It is undisputed that Respondent has failed to make the required pension payments for the months of June, July, August, and September and has failed to make the required

³ Actually, the agreement's term is to expire on April 30, 1990, unless either side terminates it prior to that time. As no party moved to terminate the agreement prior to that date, it, by its terms, was extended for an additional year.

payments to the JATF in April, May, June, July, August, September, November, and December.⁴

In May 1987, the Union filed an unfair labor practice charge alleging that Respondent violated Section 8(a)(1) and (5) of the Act by failing to make the required contributions to the Union. In June 1987, the parties executed a settlement agreement, together with a notice, providing that Respondent would make the required payments. The Union filed a similar charge in June 1988 against Respondent; as a result of this, the Board reopened the prior matter and issued a consolidated complaint in the matter. By letter dated November 30, 1988, counsel for the Union requested that this complaint be dismissed as Respondent had made the required fringe benefit contributions. The consolidated complaint was dismissed on December 2, 1988. By letter dated March 23, 1989, counsel for the Union wrote to Respondent stating that the reports and contributions had not yet been received for December 1988, January and February, stating: "Please remit your contributions and reports immediately to avoid any further action." By letter dated August 7, 1989, the Union wrote to its counsel (with a copy to Respondent) stating that Respondent was delinquent for the period February through July, asking counsel to take appropriate action for effecting the collection of these delinquent monies."

Where an employer fails and refuses to make contractually required fringe benefit payments without the consent of the exclusive bargaining representative of its employees, it has refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act. That is what Respondent has done and it therefore violated Section 8(a)(1) and (5) of the Act by failing to make the required pension contributions for June, July, August and September, and the required JATF contributions for April, May, June, July, August, September, November, and December.

CONCLUSIONS OF LAW

1. C. F. Eckert, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Painters and Allied Trades, Local 201 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen, painters, tapers, paperhangers, apprentices and/or any person who uses the tools of the trade other than a principal owner.

4. At all times material here the above-named labor organization has been and is now the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining.

5. The Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to make payments to the employee benefit funds listed below for the period listed below:

Pension Fund—June, July, August and September 1989; Joint Apprenticeship Training Fund - April, May, June, July, August, September, November and December 1989.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act: That Respondent remit all contractually required pension and JATF contributions to the Union. This shall include making employees whole for any loss of benefits resulting from the Respondent's failure to make the required payments.⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, C. F. Eckert, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to make timely payments to the Union's Pension Fund and Joint Apprenticeship Training Fund, as required by its collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay all delinquent contributions to the Funds listed below and or the periods listed below until the delinquency is extinguished, as provided by its collective-bargaining agreement with the Union: Pension Fund—June, July, August and September 1989; Joint Apprenticeship Training Fund—April, May, June, July, August, September, November, and December 1989.

(b) Make whole the unit employees for any loss of benefits they may have suffered by the Respondent's failure to transmit pension fund and JATF contributions as required by the collective-bargaining agreement in the manner set forth in the remedy section of this decision. The appropriate unit is:

All journeymen, painters, tapers, paperhangers, apprentices and/or any person who uses the tools of the trade other than a principal owner.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

⁵ *Kraft Plumbing & Heating*, 252 NLRB 891 (1980).

⁴ Actually, until shortly before the reopening of this hearing on June 7, 1990, Respondent was substantially in arrears in its pension and JATF obligations. However, about June 6, 1990, Respondent made substantial payments to these funds leaving only the above-mentioned months' balance outstanding.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its facility in Albany, New York, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representa-

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive, shall be posted by the Repondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.